AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-35 OF 2011(W)
HASHIM YUSOFF, MOHD GHAZALI AND AHMAD MAAROP FCJJ
19 JANUARY 2012

Banking — Security for advances — Guarantee — Bank's claim against defendant guarantor for outstanding sums disbursed to borrower pursuant to trust receipt facility — Whether defendant liable for sums disbursed by bank to borrower — Whether trust facility came into existence after discontinuance of guarantee by defendant — Whether defendant's liability was based on letter of credit issued by plaintiff to borrower's supplier — Whether facts of contingent liability created upon issue of letter of credit pleaded by plaintiff

Civil Procedure — Pleadings — Statement of claim — Matters to be pleaded — Whether plaintiff pleaded material facts — Whether plaintiff allowed to argue and succeed on material facts that were not pleaded

In consideration of the plaintiff bank granting banking facilities to Technoelektrik Services ('the borrower'), the defendant and two others had executed a letter of guarantee ('the guarantee') in favour of the plaintiff. By way of the guarantee, the defendant and two others had jointly and severally guaranteed to pay the plaintiff bank all sums due and owing by the borrower up to the sum of RM1m. On 24 March 1998, the defendant, a director of the borrower company, notified the plaintiff bank that he had tendered his resignation as director of the borrower, and gave the plaintiff bank three months notice to discontinue and determine the guarantee ('discontinuance of the guarantee'). On 1 June 1998, the borrower applied for an irrevocable letter of credit of RM805,795 from the plaintiff in favour of one of its suppliers. On 22 June 1998, the plaintiff issued an irrevocable letter of credit to the supplier. On 1 July 1998, when the supplier claimed the sum of RM805,795 against the letter of credit, the borrower requested the plaintiff bank to make the payment on its behalf. Accordingly on 2 July 1998, the plaintiff paid the supplier the sum of RM805,795 pursuant to the letter of credit and the borrower executed the trust receipt whereby it undertook to repay the plaintiff the sum of RM805,795 within 90 days. However, the borrower failed to pay the plaintiff the sum outstanding pursuant to the trust receipt and the plaintiff sued the defendant, in his capacity as guarantor, to recover the outstanding sum. It was the plaintiff's case that the defendant as guarantor was liable for monies disbursed under the borrower's account pursuant to the trust receipt facility. In

response, the defendant claimed that he was not liable under the guarantee as the trust facility only came into existence after the discontinuance of the guarantee. The trial judge dismissed the plaintiff's claim with costs and so the plaintiff appealed to the Court of Appeal. The Court of Appeal found that the plaintiff's claim was in fact based on monies owing under the trust receipt facility and that the plaintiff's contention that the defendant's liability was based on the letter of credit was a departure from the plaintiff's pleaded case. The Court of Appeal thus went on to find that since the plaintiff's pleaded case was based on the trust receipt facility, which came into existence on 2 July 1998 when the defendant was no longer within the purview of the guarantee, he was not liable for the sums claimed by the plaintiff bank. As such, the Court of Appeal upheld the High Court's decision and dismissed the plaintiff's appeal. This court granted the plaintiff leave to proceed with the present appeal against the decision of the Court of Appeal. The plaintiff contended that a contingent liability was incurred by the plaintiff bank upon the issuance of the letter of credit and that this contingent liability became an actual liability when the supplier presented the documents in conformity with the letter of credit.

Held dismissing the appeal with costs:

(1) If the plaintiff wanted judgment to be entered against the defendant premised upon the contingent liability of the defendant, which was created upon the issue of the letter of credit dated 22 June 1998, then this fact ought to be pleaded in its statement of claim. However, the plaintiff's pleaded case, which made no mention of the letter of credit, was that as the borrower had failed to repay the monies owing under the trust receipt before the maturity date, the defendant was liable under the guarantee. There was a clear omission by the plaintiff to plead the material facts which would constitute the necessary basis to support a claim on contingent liability. This court found that the plaintiff's pleaded case was different from the plaintiff's case that was presented and advocated in court for which judgment was sought against the defendant. Since the contingent liability of the defendant and the material facts, which were vital to support it, were not pleaded by the plaintiff in its statement of claim, the plaintiff could not be allowed to argue these points and obtain judgment on them (see paras 19–21 & 28).

(2) The contingent liability created by the issuance of the letter of credit was different from the liability created when the borrower executed the trust receipt on 2 July 1998. Based on this pleaded case, since the borrower failed to repay the money advanced by the plaintiff bank to the supplier, the guarantors were jointly and severally liable to the plaintiff. However, as the liability under the trust receipt was created after 25 June 1998 which was the effective date of the defendant's discontinuance of the guarantee, the defendant could not be held liable for the default of the borrower (see para 27).

[Bahasa Malaysia summary

Sebagai balasan bank plaintif memberikan kemudahan perbankan kepada Technoelektrik Services ('peminjam'), defendan dan dua yang lain telah memeterai surat jaminan ('jaminan') memihak kepada plaintif. Melalui cara jaminan, defendan dan dua yang lain telah secara bersama dan berasingan, menjamin untuk membayar bank plaintif semua jumlah wang perlu dijelaskan dan terhutang oleh peminjam hingga kepada jumlah wang sebanyak RM1 juta. Pada 24 Mac 1998, defendan, seorang pengarah syarikat peminjam, memberitahu bank plaintif bahawa dia telah meletakkan jawatan sebagai pengarah kepada peminjam, dan memberikan bank plaintif tiga bulan notis untuk memberhentikan dan menentukan jaminan ('pemberhentian jaminan'). Pada 1 Jun 1998, peminjam memohon surat kredit yang tidak boleh dibatalkan sebanyak RM805,795 daripada plaintif untuk salah satu daripada pembekalnya. Pada 22 Jun 1998, plaintif telah mengeluarkan surat kredit yang tidak boleh dibatalkan kepada pembekal tersebut. Pada 1 Julai 1998, apabila pembekal menuntut sebanyak RM805,795 terhadap surat kredit tersebut, peminjam meminta bank plaintif untuk membuat pembayaran bagi pihaknya. Oleh yang demikian, pada 2 Julai 1998, plaintif telah membayar pembekal jumlah wang sebanyak RM805,795 berikutan surat kredit tersebut dan peminjam memeterai resit amanah yang mana ia mengakujanji untuk membayar balik plaintif jumlah wang sebanyak RM805,795 dalam masa 90 hari. Walau bagaimanapun, peminjam gagal membayar plaintif jumlah yang belum dibayar menurut resit amanah dan plaintif mengambil tindakan ke atas defendan, dalam kapasitinya sebagai penjamin, untuk mendapatkan semula jumlah yang belum dibayar. Ia adalah kes plaintif bahawa defendan sebagai penjamin adalah bertanggungan bagi wang yang dikeluarkan di bawah akaun peminjam selaras dengan kemudahan penerimaan amanah. Sebagai balasan, defendan menghujahkan bahawa dia tidak bertanggungan di bawah jaminan kerana kemudahan amanah hanya wujud selepas penamatan jaminan. Hakim bicara menolak tuntutan plaintif dengan kos dan dengan itu, plaintif merayu kepada Mahkamah Rayuan. Mahkamah Rayuan mendapati bahawa tuntutan plaintif adalah sebenarnya berdasarkan wang yang terhutang di bawah kemudahan penerimaan amanah dan bahawa hujah plaintif bahawa liabiliti defendan berdasarkan surat kredit menyimpang daripada kes yang diplidkan oleh plaintif. Mahkamah Rayuan seterusnya mendapati bahawa memandangkan kes yang diplidkan oleh plaintif adalah berdasarkan kemudahan penerimaan amanah, yang wujud pada 2 Julai 1998 apabila defendan tidak lagi dalam skop jaminan, ia tidak bertanggungan ke atas jumlah wang yang dituntut oleh bank plaintif. Oleh itu, Mahkamah Rayuan mengekalkan keputusan Mahkamah Tinggi dan menolak rayuan plaintif. Mahkamah ini memberikan plaintif kebenaran untuk meneruskan dengan rayuan terhadap keputusan Mahkamah Rayuan. Plaintif menghujahkan bahawa liabiliti luar jangkaan telah ditanggung oleh bank plaintif dengan pengeluaran surat kredit dan bahawa liabiliti luar jangkaan ini menjadi liabiliti

sebenar apabila pembekal menyampaikan dokumen-dokumen yang selaras dengan surat kredit.

Diputuskan menolak rayuan dengan kos:

(1) Jika plaintif mengharapkan penghakiman dimasukkan terhadap defendan berlandaskan liabiliti luar jangkaan defendan, yang diwujudkan berikutan isu surat kredit bertarikh 22 Jun 1998, maka fakta ini sepatutnya diplidkan dalam penyataan tuntutan. Walau bagaimanapun, kes yang diplidkan oleh plaintif, yang tidak menyatakan mengenai surat kredit, adalah bahawa kerana peminjam gagal untuk membayar balik wang yang terhutang di bawah resit amanah sebelum tarikh matang, defendan bertanggungan di bawah jaminan. Terdapat peninggalan yang jelas oleh plaintif untuk memplidkan fakta-fakta penting yang akan menjadi asas yang diperlukan untuk menyokong tuntutan ke atas liabiliti luar jangkaan. Mahkamah ini mendapati bahawa kes yang diplidkan oleh plaintif adalah berbeza dengan kes plaintif yang telah dikemukakan dan disokong di mahkamah yang mana penghakiman dipohon terhadap defendan. Memandangkan liabiliti luar jangkaan defendan dan fakta-fakta penting, yang penting untuk menyokongnya, tidak diplidkan oleh plaintif dalam penyataan tuntutannya, plaintif tidak boleh dibenarkan untuk menghujahkan perkara-perkara ini dan mendapatkan penghakiman untuk mereka. (lihat perenggan 19–21 & 28).

(2) Liabiliti luar jangkaan yang dibuat dengan pengeluaran surat kredit adalah secara berbeza dengan liabiliti yang diwujudkan apabila peminjam memeterai resit amanah pada 2 Julai 1998. Berdasarkan kes yang diplidkan ini, memandangkan peminjam gagal untuk membayar balik wang yang didahulukan oleh bank plaintif kepada pembekal, penjamin adalah bersama dan berasingan bertanggungan kepada plaintif. Walau bagaimanapun, memandangkan liabiliti di bawah resit amanah telah dibuat selepas 25 Jun 1998 iaitu tarikh berkuat kuasa penamatan jaminan defendan, defendan tidak boleh dikatakan bertanggungan bagi pengingkaran peminjam (lihat perenggan 27).]

Notes

For cases on guarantee, see 1(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2516–2596.

For cases on statement of claim, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 6160–6199.

Cases referred to

Bunge Corp v Vegetable Vitamin Foods (Pte) Ltd [1985] 1 Lloyd's Rep 613 (refd)
Hamzeh Malas & Sons v British Imex Industries Ltd [1958] 2 QB 127 (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

A *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 (refd)
United City Merchants (Investments) Ltd & Anor v Royal Bank of Canada & Ors [1983] AC 168 (refd)
WJ Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 Lloyd's Rep 314, CA (refd)

Appeal from: Civil Appeal No W–02–2294 of 2009 (Court of Appeal, Putrajaya)

Hargopal Singh (Hargopal Singh & Co) for the appellant.
Murali Achan (Kulasekaran with him) (Kulasekar, Achan & Associate) for the respondent.

Ahmad Maarop FCJ (delivering judgment of the court):

BACKGROUND

[1] On 16 May 2011, leave was granted to the appellant (the plaintiff in the originating action) to appeal against the decision of the Court of Appeal given on 17 February 2011 which affirmed the High Court decision dismissing with costs the appellant's claim against the respondent (the defendant in the originating action). We will refer to the parties as they were in the High Court. Leave to appeal was granted on the following questions:

(a) *sama ada sebarang* 'contingent liability' *telah ditubuh atau diwujud apabila bank pemohon telah mengeluarkan* 'letter of credit' *kepada pengedar pada 22 Jun 1998* (whether contingent liability was established when the applicant bank issued letter of credit to the supplier); *dan*

(b) *sama ada* 'trust receipt' *akan menyelesaikan liabiliti di bawah* 'letter of credit' (whether the trust receipt would settle liability under the letter of credit).

[2] This court heard the appeal on 4 October 2011 and reserved its decision. We now give our judgment.

[3] The statements of agreed facts and the evidence given in the trial reveal the following brief facts. The defendant was a director of a company known as Technoeletrik Industries Sdn Bhd of 24, 1st Floor, Jalan 71C, Taman Tun Dr Ismail, 60000 Kuala Lumpur ('the borrower'). At the request and on the application of the borrower, the plaintiff, vide the offer letter dated 5 March 1997 (referred to in the statement of claim as the first letter of offer), offered to the borrower the following banking facilities:

(a) letter of credit;

(b) trust receipt;

(c) bank guarantee;

(d) shopping guarantee; and

(e) foreign exchange contract.

[4] Pursuant to the letter of offer dated 5 March 1997, on 19 March 1997 the borrower executed a 'General Agreement by Customers' ('the customer's agreement').

[5] In consideration of the plaintiff granting or continuing to grant the banking facilities to the borrower, the defendant and three other persons executed a guarantee dated 19 March 1997 ('the guarantee'), whereby the defendant and the three other persons jointly and severally guaranteed the payment to the plaintiff on demand, of all monies and liability, whether actual, certain or 'contingent now or hereafter owing or incurred or due and unpaid' to the plaintiff anywhere on any account whatsoever under the banking facilities. The guarantee is as follows:

> In consideration of Arab-Malaysian Bank Berhad (hereinafter called 'the Bank' which expression shall where the context admits include the Banks successors and assigns) making or continuing advances or otherwise giving credit or affording banking facilities for as long as the Bank may think fit or granting time to Tecknoelektrik Industries Sdn Bhd hereinafter called ('the Customer') at my/our request, I/we hereby jointly and severally guarantee to the Bank the payment of and undertake on demand being made to me/us or any of us by the Bank to pay and satisfy to the Bank forthwith all money or liability whether actual certain or contingent now or hereafter owing or incurred or due and unpaid to the Bank anywhere on any account whatsoever whether from the Customer solely or from the Customer jointly with any other person or persons or from any firm in which the Customer may be a partner including the amount of notes or bills discounted or paid and other loans credits or advances made to or for the accommodation or at the request either of the Customer solely or jointly with any other person and in whatever name style or firm or of any such firm as aforesaid or for any money for which the Customer may be liable as principal or surety in any other way whatsoever including:
>
> (a) in the case of the death bankruptcy winding-up or liquidation of the Customer all sums which would at any time have been owing to the Bank by the Customer if such death had occurred or such bankruptcy or winding-up or liquidation had commenced respectively at the time when the Bank receives actual notice thereof and notwithstanding such death bankruptcy winding-up or liquidation;
>
> (b) all monies obtained from or liabilities incurred to the Bank notwithstanding that the borrowing or incurring of such liabilities may be invalid or ultra vires or in excess of the powers of the Customer or of any director attorney agent or other

person purporting to borrow or act on behalf of the Customer and notwithstanding any other irregularity in such borrowing or incurring such liabilities;

(c) in the event of the discontinuance by any means of this guarantee all cheques drafts bills notes and negotiable instruments drawn by or for the account of the Customer on the Bank or its agents and purporting to be dated on or before the date when such discontinuance becomes known to the Bank or its agents although presented to or paid by the Bank or them after that date and all liabilities of the Customer to the Bank such date whether certain or contingent and whether payable forthwith or at some future time or times and also all credits then established by the Bank for the Customer.

[6] On 1 June 1998 the borrower applied for an irrevocable letter of credit for a sum of RM805.795 in favour of one of its suppliers, Microfocus (M), No 1–2A Jalan Pandan 3/3, Pandan Jaya, 55100 Kuala Lumpur ('the beneficiary'), for the purchase of optimisation tools and equipment. Pursuant to the said application, on 22 June 1998 the plaintiff (through the advising bank, Maybank) issued an irrevocable letter of credit to the beneficiary.

[7] On 1 July 1998, the beneficiary, through Maybank Bhd claimed the sum of RM805,795 against the said letter of credit. As the borrower did not have the necessary funds, it requested the plaintiff to make payment to the beneficiary on its behalf. On 2 July 1998, the borrower signed a trust receipt and a usance bill of exchange and collected the shipping documents and undertook to repay the plaintiff the said sum of RM805,795 within 90 days. It was agreed as a fact that a sum of RM805,795 was paid by the plaintiff pursuant to the letter of credit on July 1998. As it transpired, the borrower failed to pay the outstanding sum on the due date (30 September 1998). At the material time the outstanding sum owed by the borrower stood at RM960,431.82. The plaintiff sued the defendant to recover that amount in his capacity as a guarantor for the borrower. It must also be added that pursuant to clause of two of the guarantee, the defendant served a letter dated 24 March 1998 ('the discontinuance notice') to the plaintiff notifying the plaintiff that he had tendered his resignation as a director of the borrower, and that he was giving the plaintiff three months notice to discontinue and determine the guarantee. It was agreed as a fact that the said notice was received by the plaintiff on 25 June 1998.

IN THE HIGH COURT

[8] At the conclusion of the trial, the learned judge held that when the plaintiff issued the letter of credit to the beneficiary on 22 June 1998, no contingent liability was created that would have bound the defendant by virtue of cl 1(1) of the letter of guarantee. According to the learned judge, if any contingent liability was indeed created under the letter of guarantee it was so

created on 3 July 1998 when the plaintiff released the monies related to the letter of credit to the beneficiary. However, by that time, the defendant had been effectively discharged from any liability under the letter of guarantee as of 26 June 1998. The learned judge also held that:

> Looking at the nature of the letter of credit itself, it would be quite far-fetched to surmise that merely on account of it being issued, it would ipso facto, automatically create a contingent liability on the borrower, and thus by extension, against the defendant, as a guarantor. An issuance of a letter of credit could not be equated with it simultaneously having being deemed to have released the amount so requested. In fact, there was a time gap that happened between the issuance of the letter of credit and the eventual release of the funds to the supplier of goods and that eventual release of the funds was a matter entirely at the sole discretion of the plaintiff bank. That discretion was exercisable by the plaintiff bank upon due consideration by it of the documents which it had received from the supplier and it reserved the right to refuse to release the funds if the documents were found to be not in order. But at the same time, it may also decide to release the funds, regardless of any defects regarding the said documents. As such, the discretion to act in a given situation was entirely in hands of the plaintiff bank.
>
> But having said that, I had found myself in a situation where I was unable to agree with learned counsel for the plaintiff bank's proposition that the moment the letter of credit was issued on the instructions of the borrower, it would trigger an immediate creation of a contingent liability thereof which would bind the defendant as a guarantor. It is clear that with the issuance of the letter of credit, nothing else had happened until the supplier presented the documents for the plaintiff bank to release the funds. In this case, that event of release happened only on the 2 July 1998. By such time, the defendant had, if I may employ a common simile or metaphor, the proverbial horse had already bolted and together with the defendant sitting quite comfortably on its back. No liability of any description could be attached on him under the guarantee letter under such a circumstance such as that which had obtained in this case.

[9] That however was not the end of the matter because the learned judge further held that quite apart from the reason which he had explained earlier, (on the contingent liability point), he also agreed with the defendant's submission on the pleading point, namely, that the plaintiff's case premised as it was on the basis that the issue of the letter credit by the plaintiff having established a contingent liability against the defendant, was an afterthought as it was not pleaded in its statement of claim.

[10] The learned judge then dismissed the plaintiff's claim with costs. The plaintiff appealed to the Court of Appeal.

IN THE COURT OF APPEAL

[11] The Court of Appeal upheld the High Court's decision and dismissed

the plaintiff's appeal. In upholding the High Court decision, the Court of Appeal first dealt with and accepted the reasoning of the learned High Court judge on the pleading point. On this issue, the Court of Appeal held that there was merit in the defendant's argument that the plaintiff's pleaded case was based on the trust receipt facility which came into existence only on 2 July 1998 by which time the defendant was effectively no longer within the purview of the guarantee. The Court of Appeal said that it was not the plaintiff's pleaded case that the defendant was liable contingently for monies disbursed under the letter of credit. In this regard, the Court of Appeal referred to relevant paragraphs in the plaintiff's statement of claim as well as contemporaneous documents relied on by the plaintiff which in the court's view supported the defendant's contention that the plaintiff's claim was in fact based on monies owed under the trust receipt facility. The Court of Appeal therefore opined that the High Court was correct in concluding that the plaintiff's contention that the defendant was liable because the letter of credit was issued on 22 June 1998 was an afterthought and a departure from the plaintiff's pleaded case. The Court of Appeal was of the view that on this ground alone the appeal must be dismissed. Nevertheless, 'for completeness', the Court of Appeal went on to deal with the contingent liability point, at the end of which it concluded that:

> When the appellant issued the letter of credit to the supplier on the 22 June 1998, no contingent liability was immediately created that would have bound the respondent by virtue or cl 1(1) of the letter of guarantee. It is not disputed that no monies had been by the appellant on or before 25 June 1998. If any contingent liability was indeed created under the letter of guarantee it was so created on the 3 July 1998 when the appellant released the monies related to the letter of credit to the supplier. In our view, on the facts of the present case as contained in the appeal record taken as a whole, there was no debt actual or contingent owed by the borrower as at 25 June 1998, the date the revocation of the letter of guarantee became effective.

IN THE FEDERAL COURT

[12] Learned counsel for the plaintiff focused his submission on the contingent liability point. He contended that once the irrevocable letter of credit was issued by the plaintiff on 22 June 1998 it could not have been amended or cancelled without the consent of the beneficiary. This, he argued created a contingent liability of the plaintiff towards the beneficiary on 22 June 1998. In support of his submission he cited a number familiar of authorities on the subject of letter of credit including *Hamzeh Malas & Sons v British Imex Industries Ltd* [1957] 2 QB 127, *United City Merchants (Investments) Ltd & Anor v Royal Bank of Canada & Ors* [1983] AC 168. He referred to *Finance of International Trade* (4th Ed), by Alasdair Watson where the learned author defined a documentary credit as follows:

> A documentary credit can simply be defined as a conditional guarantee of payment made by a bank to a named beneficiary, guaranteeing that payment will be made, provided that the terms of the credit are met … with a documentary credit, exporters know that they have a bank guarantee of payment provided they comply with the terms and conditions of the credit. Thus, on receipt of an advice of a documentary credit, exporters can confidently begin to assemble and ship the goods knowing that they hold a bank guarantee of payment.

[13] Learned counsel referred to Article of Uniform Customs and Practice for Documentary Credits (UCPDC 500) which stipulates that:

(a) An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms of the Credit are complied with …

(b) …

(c) …

(d) i. Except as otherwise provided by Article 48, an Irrevocable Credit can neither be amended nor cancelled without the agreement of the Issuing Bank, the Confirming Bank, if any, and the Beneficiary.

[14] Learned counsel also referred to the *Law of Pledges, Guaranties and Letters of Credit* (5th Ed), by Poh Chu Chai where the learned author made the following observation:

> In carrying out a buyer's instructions, an issuing bank proceeds under three basic assumptions. The first assumption is that a letter of credit constitutes a separate transaction from the contract of sale or other underlying contract on which the credit is based. This means that a bank issuing a letter of credit is not concerned with the underlying contract or its terms. This assumption is spelt out in article 3 of the U.C.P. …
>
> The second assumption is that a bank involved in a letter of credit transaction deals with documents and not goods. A banker is not concerned with the actual condition or quality of the goods supplied by a seller. This fundamental principle is set out in article 4 of the U.C.P. …
>
> The third assumption is that the courts will not lightly interfere with a bank's payment obligations under a letter of credit unless there is clear evidence that a beneficiary is acting fraudulently. *This assumption is based on the fact that in practice a letter of credit is treated as equivalent of cash.* For the cash principle to operate, a beneficiary is normally entitled to obtain summary judgment for his claim and a bank's *payment obligations* are interfered only sparingly. The only recognised exception is when a beneficiary is acting fraudulently. It has been repeatedly affirmed by the courts that in the absence of fraud they will not interfere with a bank's payment obligation under a letter of credit. Thus in *Hamzeh Malas & Sons v British Imex Industrial Ltd*., Jenkins LJ. referring to the practice of the courts, said:

A We have been referred to a number of authorities, and it seems to be plain enough that the opening of confirmed letter of credit *constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties* …

B When payment under a contract of sale is to be made by means of a letter of credit, *the establishment of the letter* of credit constitutes a conditional payment by the buyer. Payment becomes absolute when actual payment is made to the seller. The right of a seller to sue for the price of the goods is suspended while the letter of credit remains in force. *The letter of credit constitutes a substituted form of payment during the validity of the credit.*

C

[15] Still on the legal effect of the letter of credit, learned counsel referred to *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 where Lord Denning MR observed:

D

The law on the point is clear. I take it first from the case of *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, 169:

It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between the buyer and the seller must be settled between themselves. The bank must honour the credit. That was clearly stated in *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127. Jenkins LJ giving the judgment of this court, said, at p 129: … it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with the established practice.

E

F

G

To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank.

Those words apply not only to confirmed credits but also to irrevocable credits … I must draw attention to the importance of letters of credit in international trade. They are the means by which goods are supplied all the world over. It is vital that every bank which issues a letter of credit should honour its obligations. The bank is in no way concerned with any dispute that the buyer may have with the seller. The buyer may say that the goods are not up to contract. Nevertheless, the bank must honour its obligations. The buyer may say that he has a cross-claim in a large amount. Still the bank must honour its obligations. *A letter of credit is like a bill of exchange given for the price of goods. It ranks as cash and must be honoured. No set off or counterclaim is allowed to detract from it:* see *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713. All the more so with a letter of credit. Whereas a bill of exchange is given by buyer to seller, a letter of credit is given by a bank to the seller with the very intention of avoiding anything in the nature of a set off or

H

I

counterclaim. This is borne out by the uniform customs and practice for documentary credits which have been adopted by the banks in all, or practically all, the countries of the world …

[16] Concluding his submission, learned counsel contended that a contingent liability was incurred by the issuing bank (the plaintiff) upon the issuance of the letter of credit. That contingent liability, he added would become an actual liability when the beneficiary presented documents in conformity with the letter of credit.

[17] In his submission supporting the decision of the Court of Appeal, before responding to the plaintiff's submission on the contingent liability point, learned counsel for the defendant again raised the pleading point which was raised in the High Court and later in the Court of Appeal. He regurgitated similar points submitted on behalf of the defendant in the courts below. The thrust of his submission was that parties were bound by their pleadings and that in this regard it was not the plaintiff's pleaded case that the defendant was liable because the borrower became contingently liable upon the issue of the letter of credit. He argued that the plaintiff's case was that the defendant was liable for monies disbursed under the borrower's account pursuant to a trust receipt facility, and that as a result of the borrower's failure to repay monies owing under the trust receipt on or before the maturity date (30 September 1998), the plaintiff demanded payment from the defendant under the guarantee. However, according to him, the trust facility came into existence only on 2 July 1998 — ie after the discontinuance of the guarantee by the defendant. According to learned counsel, it was for this reason that the High Court held that the plaintiff's case that the borrower was contingently liable upon the issuance of the letter of credit on the borrower's instruction and the consequent liability of the defendant for that contingent liability was an afterthought. He added that the plaintiff had every opportunity to but did not amend its statement of claim to plead that the defendant was contingently liable upon the issue of the letter of credit.

[18] Replying to the pleading point, learned counsel for the plaintiff submitted that the pleading must be read together with the statements of agreed facts and when this was done, he contended that the banking facilities included the letter of credit. He argued that the trust receipt was a subfacility and merely a security for the extension of time granted to the borrower to settle the sum owing under the letter of credit. Learned counsel said that the borrower did not have the money to pay the amount due under the letter of credit. The borrower then issued a trust receipt and a usance bill of exchange whereupon the plaintiff released the shipping documents to the borrower to enable the borrower to collect the goods from the shipping agents. Pursuant to the said trust receipt the borrower undertook to hold the goods in trust on

behalf of the plaintiff, sell the goods and use the sales proceeds to settle the sum owing under the letter of credit (which the plaintiff advanced first) by 30 September 1998. According to learned counsel the trust receipt did not settle the sum owed by the borrower to the plaintiff under the letter of credit. The borrower failed to honour its undertaking to pay the plaintiff the sum owing under the letter of credit on the agreed due date (30 September 1998).

[19] As would be recalled the High Court as well as the Court of Appeal decided the pleading point against the plaintiff. Indeed, the Court of Appeal made it clear that on the pleading point alone, the plaintiff's appeal must be dismissed. We are of the view that if this point were to be decided in favour of the defendant, the plaintiff's appeal would be disposed of without the necessity of considering the questions posed the answer to which would become academic. So, we will deal with the pleading point first. The question here is what actually was the plaintiff's pleaded case? From the submission made on behalf of the plaintiff on the contingent liability point, it is clear to us that the case for which the plaintiff wanted judgment to be entered against the defendant was premised upon the contingent liability of the defendant which the plaintiff said was created upon the issue of the letter of credit on 22 June 1998? So, the material fact in such a case must be the issue of the letter of credit. As we will show later, in addition to that, another fact which is equally vital as the issue of the letter of credit is the acceptance of that letter of credit by the beneficiary. The crucial question is whether contingent liability of the defendant based on the issue of the letter of credit on 22 June 1998 is the plaintiff's case as pleaded in its statement of claim? For reasons which we will set out in a moment, the answer to this question must be in the negative. The starting point is the statement of claim. After having identified the plaintiff, the defendant and borrower, the statement of claim refers to the first offer letter whereby the plaintiff offered to the borrower a number of banking facilities including the letter of credit facility as well as trust receipt facility which offer was alleged to have been accepted by the borrower. Paragraph 6 of the statement of claim then alleges that the tenure for the trust receipt facility shall 90 days only and that the said facilities shall be settled on maturity. Paragraph 9 of the statement of claim states that on 19 March 1997 the borrower signed the customer's agreement. In order to show what exactly was pleaded by the plaintiff we set out the rest of the statement of claim (the English translation) in full — starting from para 10:

> [10] As a consideration of the piaintiff granting or continuing to grant the said banking facilities to the said borrower, the defendant and three others namely HAMZAH BIN ABU (NRIC No.: 7138642), NOR AZHAM BIN ISMAIL (NRIC No.: 6259750) and SYED MUHAMMAD AZMAN BIN SYED ABU BAKAR (NRIC No.: 651226-10-6617) executed a letter of guarantee dated 19.03.1997 (hereinafter referred to as the 'said Letter of Guarantee') for inter alia guaranteeing payment of all sums owing by the said borrower to the plaintiff up

to the sum of RM1,000,000.00 and indemnifying the plaintiff for all losses suffered by the plaintiff arising out of the granting of the said banking facilities to the said borrower. The plaintiff shall refer to the said letter of guarantee to show its full effect and result at the hearing of this case.

[11] The plaintiff states that *the said borrower used the said trust receipt facility* and as at 30.11.1998 owed the plaintiff a sum of RM849,600.44 particulars of which are fully known to the said borrower and the guarantors including the defendant named herein above.

[12] As a result of the said borrower's failure to repay *the said trust receipt facility on and/or before the maturity date that is 30.09.1998.* the plaintiff sent a notice dated 08.12.1998 to the said borrower wherein the plaintiff demanded the total sum outstanding as at 30.11.1998 of RM849,600.44. However, the said borrower failed to pay the said sum to the plaintiff. The plaintiff shall refer to the said notice dated 08.12.1998 to show its full effect and result at the hearing of this case.

[13] Due to the failure of the said borrower in repaying the said sum as herein above, the plaintiff vide a letter of demand by the plaintiff's solicitors dated 15.03.1999 demanded from the said borrower and the said guarantors the *outstanding sum for the said trust receipt facility of RM872,549.04* as at 28.02.1999 together with interest calculated as follows:—

(i) interest at the rate of 2.5% above the plaintiff's base lending rate (that as at 28.02.1999 was 8.05% per annum) calculated from 01.03.1999 until the date of full settlement; and

(ii) overdue interest at the rate of 1.0% per annum on the amount outstanding and calculated from the matuhty date of 30.09.1998 until the date of full settlement.

[14] Due to the failure of the said borrower and the guarantors in repaying the said sum outstanding, *the plaintiff commenced civil action at the Kuala Lumpur High Court under Suit No: D4–22–1180– 1999 wherein on 21.12.1999 the plaintiff recorded final Judgment against the said borrower and the guarantors namely HAMZAH BIN ABU. NOR AZHAM BIN ISMAIL and SYED MUHAMMAD AZMAN BIN SYED ABU BAKAR for the sum of RM872.549.04* as at 28.02.1999 together with interest as stated herein above.

[15] Thereafter, on 23.01.2002 *the plaintiff discontinued the civil action against the defendant as the said borrower had made an application to the plaintiff for settlement of the said debt which proposal was accepted bv the plaintiff.* The plaintiff shall refer to the said borrower's letter dated 29.11.2002 to show its full effect and result at the hearing of this case.

[16] The plaintiff states that pursuant to a second letter of offer dated 22.12.2000 (hereinafter referred to as the 'said Second Letter of Offer') and a letter dated 05.07.2001 (hereinafter referred to as the 'said Third Letter of Offer'), the plaintiff agreed to reschedule the repayment of *the outstanding sum under the said trust receipt facility.*

A [17] The term and conditions of the said second and third letters of offer were that the said borrower shall repay the outstanding sum by way of instalments as follows:-

(i) that the borrower shall pay a sum of RM8,000.00 per month commencing 30.12.2000 until 31.05.2001 by way of post-dated cheques; and

B

(ii) that the borrower shall pay a sum of RM9,000.00 per month commencing 25.07.2001 until 25.12.2001 by way of post-dated cheques.

C [18] The said borrower accepted the repayment proposal as stated herein above by signing the second and third letters of offer. The plaintiff shall refer to the said second and third letters of offer to show its full effect and result at the hearing of this case.

D [19] Pursuant to an application by the said borrower vide letters dated 18.03.2002 and 29.04.2002, the plaintiff vide their letter dated 31.05.2002 (hereinafter referred to as the 'said Fourth Letter of Offer') accepted the said borrower's proposal *for repayment of the outstanding sum under the said trust receipt facility.* The plaintiff shall refer to the said fourth letter of offer to show its full effect and result at the hearing of this case.

E [20] Pursuant to the term and conditions of the said fourth letter of offer, the plaintiff agreed that the borrower shall repay the outstanding sum owed by way of instalments as follows:-

(i) RM7,000.00 per month from May 2002 until July 2002;

F

(ii) RM12,000.00 per month from August 2002 until January 2003; and

(iii) That all the above repayments shall be made by way of post-dated cheques.

[21] The said borrower accepted the above repayment proposal by signing the said G fourth letter of offer. The plaintiff shall refer to the said fourth letter of offer to show its full effect and result at the hearing of this case.

[22] The plaintiff states that the said borrower has failed to repay the outstanding sum as agreed and as stated in the said fourth letter of offer. As a result therefore the plaintiff served a notice dated 14.01.2003 to the said borrower demanding H settlement of the instalments in arrears totalling RM54,551.50. However, the said borrower defaulted, failed and/or neglected to pay the said sum and/or any part of the said sum owing to the plaintiff. The plaintiff shall refer to the said notice dated 14.01.2003 to show its full effect and result at the hearing of this case.

I [23] The plaintiff states that as at 31.03.2003, *the said borrower had repaid a total sum of RM263,039.00*. However, the said sum is insufficient to settle the full sum and interest outstanding as at 31.03.2002 totalling RM960,431.82.

[24] As a result of the above breach and/or default, the plaintiff hereby claims from the defendant as one of the guarantors to the said borrower, the sum of

RM960,431.82 outstanding as at 31.03.2003 together with interest as follows:—

(i) interest at the rate of 2.5% above the plaintiff's base lending rate (that as at 31.03.2003 was 6.40% per annum) calculated from 01.04.2003 until the date of full settlement; and

(ii) overdue interest at the rate of 1.0% per annum on the amount outstanding and calculated from the maturity date of 30.09.1998 until the date of full settlement

[25] Notwithstanding that the plaintiff and/or its solicitors have vide a letter of demand dated 23.05.2003 demanded from the defendant as a guarantor to the said borrower the sum stated hereinabove, the defendant has defaulted, breached and/or neglected to pay the said sum to the plaintiff.

[26] Wherefore, the plaintiff claims against the defendant as follows:—

(a) the sum of RM960,431.82 *outstanding as at 31.03.2003 under the said trust receipt facility together* with interest as follows:—

(i) interest at the rate of 2.5% above the plaintiffs base lending rate calculated from 01.04.2003 until the date of full settlement; and

(ii) overdue interest at the rate of 1.0% per annum on the amount outstanding and calculated from the maturity date of 30.09.1998 until the date of full settlement

(iii) costs; and

(iv) any other relief and/or remedy as this Honourable Court may deem fit. (Emphasis added.)

[20] It is clear that nothing was pleaded in the statement of claim about any letter of credit. There was clear omission to plead the material facts relating to the application, the date of issuance by the plaintiff and the acceptance of the letter of credit by the beneficiary which would constitute the necessary basis to support a claim on contingent liability desired by the plaintiff. Indeed, no mention at all about any letter of credit was made in the statement of claim. Not even a passing reference. It is clear to us that what was pleaded in the statement of claim was that the borrower had used the trust receipt facility (the particulars of which the plaintiff claimed were fully known to the borrower and the defendant) resulting in a sum of RM849,600.14 being owed by the borrower as at 30 November 1998. Due to the failure of the borrower and the guarantors in repaying the outstanding sum for the trust receipt facility, the plaintiff commenced Civil Action No D4–22–1180 of 1999 in the Kuala Lumpur High Court wherein on 21 December 1999 the plaintiff recorded final judgment against the said borrower and the guarantors namely Hamzah bin Abu, Nik Azham bin Ismial and Syed Muhammad Azman bin Syed Abu Bakar for the sum of RM872,549.04 as at 28 February 2002. Nothing was stated in the statement of claim as to why final judgment was not recorded

against the defendant. Could it be because of the notice of discontinuance of the guarantee given by the defendant? We would never know. What we do know from the statement of claim is that thereafter the plaintiff discontinued the civil action against the defendant because the borrower had applied to the plaintiff for settlement of the said debt which proposal was accepted by the plaintiff. How the civil case against the defendant was discontinued (for example whether it was withdrawn or adjourned) is not stated. Then the statement of claim states that pursuant to a second and a third letter of offer the plaintiff agreed to reschedule the repayment of the outstanding sum under the said trust receipt facility by way of instalments. Later, pursuant to an application by the borrower, vide the fourth letter of offer, the plaintiff accepted the borrower's proposal to repay the sum outstanding under the said trust receipt facility by way of monthly instalments from May 2002 to January 2003. However, the plaintiff claimed that the borrower failed to repay the outstanding sum as agreed in the fourth letter of offer. As at 31 March 2003 the borrower had repaid a total sum of RM263,039 which was insufficient to settle the full sum and interest totalling RM960,431.82. As a result of the aforesaid default, the plaintiff claimed the said sum from the defendant as one of the guarantors. That is the pleaded case of the plaintiff. Even the following documents which were relied on by the plaintiff support the finding that the plaintiff's case was actually for money owing to the plaintiff under the trust receipt facility executed by the borrower:

(a) the plaintiff's letter of demand dated 23 May 2003. In fact this letter also alleges the borrower's failure to repay and/or regularise the sum outstanding pursuant to restructuring agreements dated 22 December 2000, 5 July 2001 and 31 May 2002 which appear to correspond respectively to the second, third and fourth letters of offer referred to in the statement of claim dated 22 December 2000, 5 July 2001 and 31 May 2002 (p 148, Vol 2 of the appeal record);

(b) the account statement dated 31 March 2003 under the caption 'Facility: Trust Receipt' (p 152, of Vol 2 of the appeal record); and

(c) the certificate of undebtedness which refers to a sum of RM960,431.82 owing as at 31 March 2003 under a trust receipt facility (P 153, of the Vol 2 of the appeal record).

[21] In our view the plaintiff's pleaded case as aforesaid is different from the plaintiff's case presented and advocated in court for which judgment was sought against the defendant. There was no explanation given by the plaintiff to account for the omission to plead the material facts which we have referred to in support of its case of contingent liability against the defendant. Instead, learned counsel for the plaintiff contended that the sum claimed under the trust receipt was actually the amount owed by the borrower to the plaintiff under the letter of credit allegedly issued on 22 June 1998 for which the

defendant was contingently liable. We cannot accept that contention. In our view, the contingent liability created by the issuance the letter of credit (*and* its acceptance by the beneficiary) was different from the liability created when the borrower executed the trust receipt on 2 July 1998. To show the difference it is necessary to appreciate the effect of the issuance of an irrevocable letter of credit by the plaintiff and its acceptance by the beneficiary. This was explained by Lord Denning MR in the leading case of *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 Llyod's Rep 314 in the following manner:

> THE EFFECT OF A LETTER OF CREDIT
>
> When an irrevocable letter of credit is issued by one bank and confirmed by another, it may be a 'conforming' credit; that is, one which conforms exactly to the contract of sale: or it may be a ' non-conforming' credit; that is, one which does not conform exactly to the contract of sale, but is afterwards modified or accepted as being satisfactory to all concerned. It then becomes equivalent to a 'conforming credit'. In any such case the question arises whether the credit is to be regarded as absolute payment of the price, or as conditional payment of it, or as no payment at all but only a means by which payment may be obtained; ie, as collateral security.
>
> This must be a matter of the true construction of the contract: but, in order to construe it, it is important to bear in mind what the consequences are in each case.
>
> ABSOLUTE PAYMENT
>
> If the letter of credit is absolute payment of the price, the consequences are these: The seller can only look to the banker for payment. He can in no circumstances look to the buyer. The seller must present the documents to the banker and get payment from him in cash or get him to accept sight or time drafts. If the banker does not take up the documents, the seller will retain them, resell and sue the banker for damages. If the banker takes up the documents in exchange for time drafts, and the banker afterwards becomes insolvent, the seller must prove in the liquidation. He cannot sue the buyer …
>
> CONDITIONAL PAYMENT
>
> If the letter of credit is conditional payment of the price, the consequences are these: The seller looks in the first instance to the banker for payment: but, if the banker does not meet his obligations when the time comes for him to do so, the seller can have recourse to the buyer. The seller must present the documents to the banker. One of two things may then happen: (1) The banker may fail or refuse to pay or accept drafts in exchange for the documents. The seller then, of course, does not hand over the documents. He retains dominion over the goods. He can resell them and claim damages from the buyer. He can also sue the banker for not honouring the credit: see *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd,* [1922] 1 KB 318; (1921) 9 LIL Rep 572. But he cannot, of course, get damages twice over. (2) The bank may accept time drafts in exchange for the documents, but may fail to honour the drafts when the time comes. In that case the banker will have the documents and will usually have passed them on to the buyer, who will have paid the bank for them. The seller can then sue the banker on the drafts: or if the banker fails or is insolvent, the

A seller can sue the buyer. *The banker's drafts are like any ordinary payment for goods by a bill of exchange. Thev are conditional payment but not absolute payment. It may mean that the buyer (if he has already paid the bank) will have to pay twice over. So be it. He ought to have made sure that he employed a 'reliable and solvent paymaster'.…*

B NO PAYMENT AT ALL

If the letter of credit is no payment at all, but only a means by which payment may be obtained, ie if it is only collateral security, the consequences are these: The seller ought to present the documents to the banker. If the seller does not do so, he will be guilty of laches in enforcing his security and the buyer will be discharged — see C *Peacock and Another v Pursell,* (1863) 14 CBNS 728. But if on presentation the banker fails or refuses to take up the documents, then (if the letter of credit is only collateral security) the seller will be entitled to take the documents round to the buyer (or send them to him) and demand that he take them up and pay the price. This situation finds no place in any of the authorities.

D

[22] His Lordship then concluded that when the letter of credit was issued and accepted by the seller, it operated as conditional payment of the price. It did not operate as absolute payment:

E As a result of this analysis, I am of the opinion that in the ordinary way, when the contract of sale stipulates for payment to be made by confirmed irrevocable letter of credit, then, *when the letter of credit is issued and accepted by the seller, it operates as conditional payment of the price.* It does not operate as absolute payment.

F It is analogous to the case where under a contract of sale, the buyer gives a bill of exchange or a cheque for the price. It is presumed to be given, not as absolute payment, nor as collateral security, *but as conditional payment. If the letter of credit is honoured by the bank when the documents are presented to it the debt is discharged.* If it is not honoured, the debt is not discharged: and the seller has a remedy in damages against both banker and buyer.

G

[23] It is clear that in order to operate as a conditional payment of the price, the letter of credit must have been issued and accepted by the seller. Thus, in the context of the present appeal when the letter of credit was issued and accepted H by the beneficiary, it would constitute a conditional debt of the plaintiff (the issuing bank) — a debt subject to the condition that the beneficiary presents specified documents, for which the borrower would be liable under the customer's agreement and the defendant would be contingently liable under the guarantee. The importance of the fact that the letter of credit must be I accepted by the seller (beneficiary) in addition to the fact that the letter of credit was issued can also be seen in the determination of the question as to when would a letter of credit become irrevocable.

[24] In *Bunge Corp v Vegetable Vitamin Foods (Pte) Ltd* [1985] 1 Lloyd Rep

613 it was held that a letter of credit did not become irrevocable until it had been communicated to the beneficiary. Explaining this Neill J said:

> The opening of a confirmed letter of credit involves three contracts:(a) a contract between the buyer and the issuing bank; (b) a contract between the issuing bank and the seller beneficiary; and (c) a contract between the confirming bank and the seller beneficiary. If the argument on behalf of the buyers were correct it would mean that a letter of credit is opened as soon as the first of those contracts has been concluded. *It seems to me that that cannot be right and that a letter of credit cannot be regarded as having been opened until the second and third contracts have come into existence and the credit or something eguivalent to it has been communicated to the seller or to his agent.* This approach seems to me to be in conformity with the speeches of Lord Wilberforce and Lord Brandon in *Brinkibon Ltd v Stahag Stahl Und Stahlwarenhandelsgesellschaft mbH,* [1982] 1 Lloyd's Rep 217;[1983] 2 AC 34. That was a case which was concerned with offer and acceptance, but I *can find nothing in those speeches to throw doubt on the proposition that it is not until the contracts between the banks and the seller come into existence and communication has been made that the letter of credit can be said to be opened. That approach also seems to me to be in accord with the principle that a letter of credit does not become irrevocable until it has been communicated to the beneficiary. Therefore on this first point I accept Mr White's argument and reject that of Mr Young. It therefore becomes important to consider whether in fact this letter of credit was opened in time or not.*

[25] Sometimes the buyer does not have the fund to pay the bank. This is where trust receipt comes into the picture. In *Paget's Law of Banking*, (12th Ed), at p 639, the learned author makes the following observation:

> 31.7 Before payment to the pledgee can be made, the pledgor, often a buyer of the goods, may need to put the goods to use, for example sell them, in order to raise funds. The pledgor may therefore ask the bank to release the goods so that they can be used or sold. In such a case, the bank will have to transfer the goods to the owner and consequently lose possession, and would thereby ordinarily lose its security. However, by the use of trust receipt (also sometimes known as a 'letter of trust') the bank is able to part with possession and yet remain secured. The trust receipt is a document by which the bank's customer, the pledgor, acknowledges that he holds the goods, and the proceeds of sale, on trust for the bank.

[26] This was what happened in the present case. On 1 July 1998, the beneficiary claimed the sum of RM805,795 against the letter of credit. If the borrower had the funds that sum could be paid and the debt to the beneficiary would be discharged, and the borrower's liability to the plaintiff would also be discharged. In such a case the execution of a trust receipt would not have been necessary. However, as it transpired, the borrower did not have the necessary funds and it requested the plaintiff to make payment to the beneficiary on its behalf. Accordingly, on 2 July 1998, the borrower executed the trust receipt whereby the borrower made the following undertaking to the plaintiff:

In consideration in your handing to me/us the shipping document(s), godown warrant(s) warehouse receipt(s) and/or order(s) covering goods as per particulars at foot now held by you as security for the due payment of Bill(s) of E No(s) 0011L982486 for RM805795.00 drawn on me/us (whether any extension or renewal in part or whole of such has been made thereof) and for the repayment advances made by you against such Bills and/or other liabilities or indebtedness due and owing by me/us to you I/we undertake:

(1) To receive, land, store or warehouse and hold the said goods as Trustee(s) for you and on your behalf but at my/our risk and expenses and in the event of the said goods or any portion thereof being sold before full payment of the said repayment in full of the said advances with interest and charges and/or other liabilities or indebtedness afores proceeds of such sales shall be paid over to you specifically and immediately as and when the same are received.

(2) Not to pledge nor sell nor dispose of any part of the said goods on credit or otherwise without your previous cor writing.

(3) To hold the document(s) covering any of the said goods for the time being unsold as trustee(s) for you and on your and to hand you the same forthwith on demand or pay you the full value of such goods to your satisfaction.

(4) To insure and keep insured at my/our cost and expenses the said goods to their full insurable invoice value against any other risk you may think fit with such insurance company approved by you and to hold the insurance policy or on your behalf and to your order and in the event of loss to collect the insurance money from the insurance concerned as speedily as possible and to hand to you forthwith any amounts thus received from the insurance company.

(5) To acknowledge that you have the full authority to demand from me/us the immediate return of the aforesaid documents or to take possession of the said goods or to obtain the refund of proceeds of goods which have been sold or disposes me/us and to give you on request full authority to receive from any person or persons the proceeds of sale thereof.

[27] It is opportune to note at this juncture that it is an agreed fact that a sum of RM805,795 was paid by the plaintiff pursuant to the letter of credit on 2 July 1998. In other words, on 2 July 1998, the plaintiff had honoured its undertaking and obligation to the beneficiary under the letter of credit. The debt to the beneficiary was therefore discharged (see *WJ Alan & Co v El Nasr Export and Import Co*). Thus on 2 July 1998, the plaintiff's liability to the beneficiary (for which the borrower and defendant was contingently liable) was also discharged. What remained was the borrower's liability to the plaintiff under the trust receipt to repay the money advanced by the plaintiff under the letter of credit. It is in this sense that we said earlier that the liability to pay under the trust receipt is different from the contingent liability created by the issuance of and acceptance by the beneficiary of the letter of credit. For reasons which we have dealt with, we hold that the pleaded case of the plaintiff was based on liability for the sum outstanding pursuant to the trust receipt. Based

on this pleaded case, since the borrower failed to repay the money advanced by the plaintiff to the beneficiary as aforesaid, the guarantors (other than the defendant) were jointly and severally liable to repay the plaintiff. As for the defendant, since the liability under the trust receipt was created after 25 June 1998 (the effective date of the discontinuance of the guarantee in relation to the defendant), the defendant could not be held liable for the default of the borrower.

[28] Since the contingent liability of the defendant and the material facts which were vital to support it were not pleaded by the plaintiff in its statement of claim, the plaintiff could not be allowed to succeed and obtain judgment on them. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, the Supreme Court, after referring to a number of high authorities held that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal. In our judgment on this ground alone the plaintiff's appeal must be dismissed. In the circumstances we do not find it necessary to answer the questions posed.

CONCLUSION

[29] For reasons already given, we would affirm the decision of the Court of Appeal and dismiss the plaintiff's appeal with cost.

Appeal dismissed with costs.

Reported by Kohila Nesan